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Unsolicited Commercial Telephone Calls and the First Amendment: A Constitutional Hangup

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The telephone has become a fixture in the American home, providing instant access to a myriad of goods, services, and people. Never slow to miss such a golden opportunity, purveyors of those goods and services have turned the telephone into a formidable sales tool.[1] Estimates of the number of telephone calls soliciting sales made per day range as high as seven million.[2] Religious groups, charitable and civic organizations, political organizations, and poll-takers have not overlooked this valuable means of distributing their messages.[3] Technology has provided automated equipment capable of calling up to 1,000 numbers per day, playing a pre-recorded sales message, and taking orders, all without a human attendant.[4] In some cases, hanging up on the machine does not disconnect the device from the telephone, causing a variety of problems, including depriving an individual subscriber of a service for which he or she pays.[5] The machinery used to place calls is becoming even more sophisticated; one of the newer designs is capable of recording responses to questions and varying the program played to match those responses.[6]

The only option available to most telephone subscribers who wish to avoid the interruptions caused by unsolicited telephone calls is the unlisted telephone number. This option may not be particularly desirable for the vast majority of individuals, however, since it effectively eliminates many telephone calls that may be welcome.[7] Additionally, the

1. National advertising agencies exist that specialize in telephone sales campaigns. One such agency has used as many as 15,000 telephone solicitors in 550 market areas. *See* Note, *Unwanted Telephone Calls—A Legal Remedy?*, 1967 UTAH L. REV. 379, 379 n.1 (1967).

2. *A Revolt Against "Junk Calls,"* BUS. WEEK, Feb. 20, 1978, at 26 [hereinafter cited as *A Revolt*].

3. *See* M. BRENTON, THE PRIVACY INVADERS 176 (1964) [hereinafter cited as M. BRENTON]. Charities raise billions of dollars every year, much of which is solicited in the home. *See id.* at 199-200.

4. *Foes of "Junk Calls" Go Into Action*, U.S. NEWS AND WORLD REPORT, March 27, 1978, at 67 [hereinafter cited as *Foes of "Junk Calls"*].

5. In one admittedly extreme case, a Minneapolis woman whose mother suffered a heart attack had to use a neighbor's telephone to summon aid because a call placed by an automated dialer did not disconnect when she hung up her telephone. *See id.*

6. *See A Revolt*, *supra* note 2, at 27.

7. A telephone directory is an essential instrumentality in connection with the peculiar service which a telephone company offers for the public benefit and convenience. It is as

unlisted telephone number provides no protection from the automated sequential dialing equipment that can be programmed to dial every number in a given exchange.[8] In reaction to the receipt of these unwanted calls, consumers have begun to apply pressure to legislatures and regulatory agencies to do something about "junk calls."[9] In response, although no significant action has yet been taken by Congress,[10] investigations into the problem have commenced,[11] and some states have taken at least the first steps toward curtailing these calls.[12]

The problems posed by unsolicited telephone calls will become more serious as technology provides more sophisticated equipment unless there is a positive response to consumer pressure to regulate unsolicited telephone calls. Since the content of these telephone calls has been termed speech within the meaning of the first amendment,[13] any regulation must be able to withstand a challenge based on the first amendment right to free speech. This comment will examine the degree of protection afforded unsolicited commercial telephone calls, the limits of the right of privacy of the telephone subscriber, and the amount of protection from such calls the state can constitutionally provide to the consumer in light of the developing commercial speech doctrine. As a result of the analysis in this comment, it will be seen that regulation of commercial speech is permissible if it is reasonable in time, place, and manner and is based on the right to privacy in the home. Initially, however, a review of recent United States Supreme Court decisions in the area of commercial speech will be helpful in understanding the impact of the first amendment on unsolicited telephone calls. Likewise, it

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> much so as is the telephone receiver itself, which would be practically useless . . . without the accompaniment of such directories.

California Fireproof Storage Co. v. Brundige, 199 Cal. 185, 188, 248 P. 669, 670 (1926). Unlisted numbers place an additional burden on telephone company personnel, who must act as an answering service and contend with irate callers who cannot obtain a number for someone known to have a telephone. Also, additional fees are charged to provide an unlisted telephone number. *See* M. BRENTON, *supra* note 3, at 178.

8. *See Foes of "Junk Calls," supra* note 4, at 67.

9. By early 1978 the Federal Communications Commission had received about 1000 complaints, most of them concerning the automatic dialer. *See id.*

10. A telephone privacy bill backed by 87 representatives and six senators was introduced in Congress early in 1978. *Id.*

11. The White House Office of Telecommunications Policy and the Federal Communications Commission have been looking into the problem. *A Revolt, supra* note 2, at 26.

12. In its 1978 session, the California Legislature enacted a law regulating automatic dialing-announcing devices. CAL. STATS. 1978, c. 877, at— (enacting CAL. PUB. UTIL. CODE §§2821-2825). In addition, the California Public Utilities Commission ordered adoption of a tariff virtually identical to the new law. Public Utilities Comm'n Decision No. 89397 (Sept. 19, 1978) (copy on file at the *Pacific Law Journal*). *See* 10 PAC. L.J., REVIEW OF SELECTED 1978 CALIFORNIA LEGISLATION 382 (1979). Other states, including Maryland, Virginia, Florida, Illinois, and Michigan, have considered legislation in this area. *Foes of "Junk Calls," supra* note 4, at 67.

13. Advertising has been consistently treated as speech by the courts, although it has not always enjoyed protected status. *See, e.g.*, Breard v. Alexandria, 341 U.S. 622, 641-42 (1951); Valentine v. Chrestensen, 316 U.S. 52, 54-55 (1942).

will be necessary to briefly categorize the types of unsolicited telephone calls one might receive to assess any state regulation of commercial telephone calls.[14]

UNSOLICITED TELEPHONE CALLS

The unsolicited telephone calls that give rise to consumer protest fall into three classifications. The first classification contains those calls that are intended to impart or elicit information—calls from polling organizations and political groups. The second are those that seek donations of time, money, or other forms of support for various civic, charitable, or religious organizations. Both the informational and donative types of calls would be given full protection under the first amendment if they "contained factual material of clear public interest."[15] These types of speech are not under consideration in this comment.[16]

The third classification of unsolicited telephone calls is composed of those in which the caller is attempting to sell goods or services. It is this third classification of calls that can be considered to be within the classification of speech that the courts have termed "commercial" and that is the subject of this comment. As used here, unsolicited commercial telephone calls are those in which the caller attempts to sell goods or services at a profit.[17] It appears that commercial speech in general has been given less protection by the United States Supreme Court[18] and thus may be subject to more regulation than wholly protected speech; but before that conclusion can be reached, it is necessary to explore the history of the commercial speech area.

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14. While there are many constitutional questions that may arise when dealing with the regulation of commercial speech, the focus of this comment is limited to some of the first amendment considerations necessary in order to frame a regulation that restricts access to private homes by those who use the telephone as an advertising tool. Such issues as overbreadth and the impact of the commerce clause will not be considered, as they are beyond the scope of this comment. Clearly, there are problems concerning telephone calls placed on interstate lines that originate outside California, which is one reason that many complaints and requests for action have been directed at federal rather than state agencies.

15. Bigelow v. Virginia, 421 U.S. 809, 822 (1975).

16. Although the contents of both of these classifications of calls are protected by the first amendment, the interests that must be considered in framing a restriction of political or religious speech raise additional problems and areas of concern. While these calls may be subject to certain kinds of regulation, other issues, such as prior restraint, equal protection, and freedom of religion, are raised that are beyond the scope of this comment. *See* Comment, *Assault upon Solitude—A Remedy?*, 11 SANTA CLARA LAW. 109, 121-22 (1970).

17. The United States Supreme Court has never specifically defined "commercial speech," but rather has merely assumed its existence. It is not necessary for the discussion contained herein to formulate an all-inclusive definition of commercial speech, since under any circumstances such speech is assumed to include notice that a product or service is for sale and a request that someone purchase it.

18. See notes 58-67 and accompanying text *infra*.

PROTECTION OF COMMERCIAL SPEECH

A. History

Prior to 1976 purely commercial speech was commonly viewed as unprotected by the first amendment since it was seen to fall into the same nonfavored status as obscenity and "fighting words."[19] In *Valentine v. Chrestensen*[20] the United States Supreme Court first held that commercial speech was unprotected by the first amendment. But within one year of *Chrestensen*, the Court began to retreat from this position.[21]

An analysis of the rise of commercial speech to protected status shows that in very few cases was such speech actually *un*protected. Only in the door-to-door solicitation cases did the Court draw a clear line based on the commercial content of the speech.[22] In *Martin v. City of Struthers*[23] the Court invalidated a statute that forbade knocking on a door or ringing a doorbell to distribute literature by finding that freedom of speech necessarily included the right to distribute that speech.[24] Likewise, in situations involving the sale of religious literature, an absolute ban on door-to-door activity has not been allowed by the Court.[25] In *Breard v. Alexandria*,[26] however, an ordinance prohibiting door-to-door solicitation without the prior consent of the homeowner was found *not* to violate the first amendment.[27] The Court in *Breard* found the act of selling goods was not protected and distinguished *Martin*, stating that no commercial element had been involved in that case.[28] Even the dissent of Justice Black, arguing that freedom of the press should protect Mr. Breard's magazine sellers, recognized that "the present ordinance could constitutionally be applied to a 'merchant' who goes from door to door 'selling pots.' "[29]

The cases subsequent to *Breard* do not follow this strict view of com-

19. *Compare* Breard v. Alexandria, 341 U.S. 622, 644-45 (1951) *and* Valentine v. Chrestensen, 316 U.S. 52, 54 (1942) *with* Roth v. United States, 354 U.S. 476, 484-85 (1957) *and* Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).

20. 316 U.S. 52 (1942).

21. The first signs of the weakening of the *Chrestensen* decision were in cases in which the primary motive of the individual was noncommercial despite the solicitation of money. *See* Murdock v. Pennsylvania, 319 U.S. 105, 112 (1943) (invalidating license tax on sales of religious literature as sales were incidental to dissemination of religious belief). *See generally* Comment, *The Commercial Speech Doctrine and the First Amendment*, 12 TULSA L.J. 699, 700-03 (1977).

22. *Compare* Martin v. Struthers, 319 U.S. 141 (1943) *with* Breard v. Alexandria, 341 U.S. 622 (1951).

23. 319 U.S. 141 (1943).

24. *See id.* at 146.

25. *See* Murdock v. Pennsylvania, 319 U.S. 105 (1943).

26. 341 U.S. 622 (1951).

27. *Id.* at 641-45.

28. *Id.* at 642-43.

29. *Id.* at note accompanying text at 650 (Black, J., dissenting).

mercial speech. In *New York Times Co. v. Sullivan*,[30] it was noted that speech was not rendered commercial simply because it is in the form of an advertisement.[31] In addition, Justice Brennan found *Chrestensen* did not render advertisements unprotected since the advertisement in question did more than propose a commercial transaction.[32] In 1973 the issue of first amendment protection for commercial speech was again before the Court in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*.[33] Pittsburgh Press argued that even if advertisements and layouts were commercial speech, they were subject to a higher level of protection than *Chrestensen* would suggest, and that commercial speech should be protected.[34] Justice Powell, writing for the majority, found the argument unpersuasive since he viewed the advertisement as one for illegal commercial activity.[35] Since the activity was illegal, the advertisement could be regulated even if the speech itself were protected. In separate dissents, however, Justices Douglas and Stewart argued that the advertising layouts should have been granted first amendment protection and questioned the continuing validity of *Chrestensen*.[36]

In 1975 the unprotected status of commercial speech was dealt a death blow in *Bigelow v. Virginia*,[37] which invalidated a statute that made the circulation of any publication that encouraged or promoted abortion a misdemeanor.[38] Bigelow had published an advertisement dealing with the availability of abortions in New York.[39] The Court declared that the holding in *Chrestensen* was limited to its facts, that *Chrestensen* merely upheld "a reasonable regulation of the manner in which commercial advertising could be distributed,"[40] and that the Virginia courts had erred in assuming that advertising had no first amendment protection.[41] *Bigelow* arguably could have been decided based on the "clear public interest" in material communicating the availability of abortions.[42] The Court noted, however, that it was not deciding the "extent to which constitutional protection is afforded commercial ad-

30. 376 U.S. 254 (1964).
31. *Id.* at 265-66.
32. *Id.* at 266.
33. 413 U.S. 376 (1973).
34. *See id.* at 388.
35. Pittsburgh Press Co. allowed employers to place advertisements in male and female help-wanted columns. This was held by the Court to violate an ordinance prohibiting discrimination in employment and was therefore illegal commercial activity. *See id.*
36. *See id.* at 398 (Douglas, J., dissenting), 401 (Stewart, J., dissenting).
37. 421 U.S. 809 (1975).
38. *Id.* at 812-13.
39. *Id.* at 811-12.
40. *Id.* at 819.
41. *See id.* at 818-20.
42. *See id.* at 822.

vertising under all circumstances and in the face of all kinds of regulation."[43] One year later, in *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[44] the Court squarely addressed the issue of the existence of a first amendment cloak for commercial speech.[45]

B. Factoring in Virginia Pharmacy

The landmark decision of *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[46] raised commercial speech to protected status[47] and required that attempts to regulate such speech be subjected to the standards of scrutiny established by the Court to prevent violation of the first amendment.[48]

The *Virginia Pharmacy* decision involved a challenge by a consumer group of a statute that prohibited the advertising of the prices of prescription drugs and declared such advertising to be unprofessional conduct by a pharmacist of the type that could result in disciplinary action.[49] The Commonwealth of Virginia argued that the statute was a valid exercise of the police power that protected the public health by maintaining a high degree of professionalism in its pharmacists.[50] The Commonwealth suggested that by allowing price advertising the stable interpersonal relationships between pharmacists and customers would be destroyed, and customers would shop for cut-rate prices at the expense of their health.[51] It was further suggested that the cost of advertising would actually *raise* the cost of drugs.[52] The primary argument advanced by the Commonwealth, however, was that advertising of prices was pure commercial speech, devoid of any political or ideological content, and it therefore was not protected by the first amendment and could be prohibited.[53]

Speaking for the Court, Justice Blackmun found that the concept of commercial speech as a totally unprotected class had been all but destroyed by the Court in its decision in *Bigelow v. Virginia*.[54] The speech

43. *Id.* at 826.
44. 425 U.S. 748 (1976).
45. *Id.*
46. *Id.*
47. *See id.* at 762.
48. *See id.* at 769-70.
49. *See id.* at 751-52. The statute under attack defined unprofessional conduct by a pharmacist to include advertising the price of any drug that must be dispensed by prescription. The possible penalties for a pharmacist found guilty of such conduct included fines, revocation or suspension of one's license, or both. *Id.*
50. *See id.* at 766.
51. *See id.* at 767-68.
52. *See id.* at 768.
53. *See id.* at 758.
54. *Id.* at 759.

in *Bigelow* had been found by the Court to have elements other than pure commercialism, leaving a lingering doubt that *pure* commercial speech was still not protected.[55] The speech prohibited by the statute under attack in *Virginia Pharmacy*, however, could not be found to be anything other than a proposal for a purely commercial transaction,[56] leaving the issue squarely before the Court of whether speech, the content of which cannot be construed as anything other than commercial, is wholly outside the protection of the first amendment.[57]

In order to resolve this issue, the Court looked to the interests served on both sides of the question. The purely economic motive of the advertiser, the interest of the public in the free flow of information generally, and the right of consumers to know "who is producing what product for what reason and at what price"[58] all weighed on the side of allowing price advertising.[59] On the side of prohibition were the desire of the Commonwealth to maintain a high degree of professionalism in its pharmacists[60] and speculation that advertising would have an adverse effect on prices.[61] Although these considerations were viewed as adequate to justify regulation absent first amendment protection,[62] the Court found them to be insufficient when balanced against the need of the consumer for the information, particularly since the effect of the regulation was *total* suppression of price information concerning prescription drugs.[63] Additionally, the Commonwealth already had the means available to discipline any pharmacist whose conduct was detrimental to the public interest.[64] Thus, the Court refused to allow the Commonwealth to keep the public ignorant of the price of prescription drugs as a means of protecting it from such pharmacists.[65] Under *Virginia Pharmacy*, simply attaching the label "commercial speech" to a communication is no longer sufficient to remove it from the protection

55. *See* 421 U.S. at 822.
56. *See* 425 U.S. at 760-61.
57. Justice Blackmun characterized the issue very simply: Is there any first amendment protection for the statement, "I will sell you X drug at Y price"? *Id.* at 761.
58. *See id.* at 762-64.
59. *See id.* The interest of the consumer in this information seems to weigh heavily with the Court, which views that interest as perhaps keener than the interest in the day's most urgent political debate. *Id.* at 763.
60. *See id.* at 766-68. The state argued that price advertising would spur customers to seek out the lowest prices, which would result in a decline in the relationship between pharmacist and customer since building such rapport would become time-consuming and therefore too costly. *Id.*
61. *See id.* at 768.
62. *See id.* at 769. *Cf.* Head v. New Mexico Bd. of Examiners in Optometry, 374 U.S. 424 (1963) (ban on advertising of optometrists' services upheld when a challenge was based on due process and equal protection).
63. *See* 425 U.S. at 770.
64. *See id.* at 768. See note 49 *supra*.
65. *See id.* at 769-70. The state seemed to fear that the low-cost, low-quality pharmacist would drive the true professional out of business, but the Court refused to accept this logic, stating that if the people are well enough informed, they will perceive their own best interests.

afforded by the first amendment.[66] In holding that commercial speech was no longer unprotected under the first amendment, the Court nonetheless recognized that *regulation* of commercial speech was not precluded by its decision.[67]

REGULATION OF COMMERCIAL SPEECH

A. Focus on the Listener

Justice Blackmun's opinion in *Virginia Pharmacy* was the first major indication by the Court that the interests of the listener could be considered in deciding whether to extend protection to a certain class of speech.[68] The free flow of commercial information was seen as necessary to aid consumers in making intelligent, well-informed economic decisions.[69] This informational interest was paramount in the Court's consideration when deciding that price advertising should be permitted and has been consistently considered in later cases dealing with the degree of protection afforded to commercial speech.[70] In *Bates v. State Bar of Arizona*,[71] *Ohralik v. Ohio State Bar Association*,[72] and *Friedman v. Rogers*,[73] the Court continued to emphasize that the kind of commercial speech it envisioned as protected by the first amendment was speech that conveyed information necessary to consumers to aid them in their decisions in the marketplace.[74] Clearly, not all commercial speech is protected.[75] For example, the Court has noted that although a great deal of advertising is not actually false, it may well be deceptive or misleading.[76] Much untruthful *ideological* speech, however, is protected in the interest of society as a whole,[77] and the primary consideration is to protect the right of the *speaker*. Since in commercial speech the concern of the Court is the right of the *listener*, regulation of untruthful or deceptive advertising is a unique problem, not common to other classes of speech, and the states are free to continue such regula-

66. *See id.* at 759-60.
67. *Id.* at 770-73. Chief Justice Burger's concurring opinion carefully delineated what he felt to be the very narrow limits of the decision. He noted that the advertising of prepackaged drugs was not the same as advertising by doctors and lawyers. *Id.* at 774 (Burger, C.J., concurring).
68. *See id.* at 763.
69. *See id.* at 764-65.
70. *See id.* at 765.
71. 433 U.S. 350 (1977).
72. 436 U.S. 447 (1978).
73. 99 S. Ct. 887 (1979).
74. *See* 433 U.S. at 374-75; 436 U.S. at 457-58; 99 S. Ct. at 893, 895.
75. *See* 425 U.S. at 770-71.
76. *See id.* at 771.
77. *See id.* at 771 & n.24; Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974); Konigsberg v. State Bar, 366 U.S. 36, 49 & n.10 (1961).

tion.[78] The constitutionality of such regulation, however, depends on the status of protection afforded commercial speech.

B. Possible "Chill"

The initial interpretive response to the decision in *Virginia Pharmacy* was that the decision gave commercial speech the same status as all other protected speech.[79] The decision may be read to state that there is no longer a commercial speech exception to the first amendment.[80] If this is an accurate interpretation, there is no longer a need to label speech "purely commercial" to determine the extent of protection afforded by the first amendment, since it must be regulated using the same criteria used to regulate any other class of protected speech. In subsequent decisions, however, the Court has continued to refer to commercial speech as a separate class.[81] In an oft-quoted footnote from the *Virginia Pharmacy* decision, the Court admitted the existence of "commonsense differences" between purely commercial speech and other varieties that, while not justifying absolute prohibition, clearly supported the conclusion that a different type of protection was necessary for purely commercial speech.[82] The clearest difference between commercial and political speech is that advertising is the road to increased profits. Because of this difference, the Court saw little likelihood that regulation would chill and ultimately destroy commercial speech[83] and noted that the "greater objectivity and hardiness" of commercial speech might also make the prohibition against prior restraints inapplicable.[84] It is important to observe, however, that the Court limited the holding in *Virginia Pharmacy* to price advertising by pharmacists.[85]

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78. *See* 425 U.S. at 771. Advertising of illegal transactions continues to be unprotected. *See* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973). The special situation of the broadcast media permits a much greater degree of regulation. *See* Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582 (D.D.C. 1971), *aff'd sub nom.* Capital Broadcasting Co. v. Acting Attorney General, 405 U.S. 1000 (1972).

79. "After a confusing and unpopular history, the commercial speech doctrine is dead. Advertising is now recognized as a conveyor of information and is entitled to first amendment protection." Note, *The Demise of the Commercial Speech Doctrine and the Regulation of Professional's Advertising: The Virginia Pharmacy Case*, 34 WASH. & LEE L. REV. 245, 262 (1977).

80. *See* 425 U.S. at 762.

81. *See, e.g.*, Friedman v. Rogers, 99 S. Ct. 887 (1979); FCC v. Pacifica Foundation, 438 U.S. 726 (1978); Bates v. State Bar of Arizona, 433 U.S. 350 (1977).

82. 425 U.S. at 771 n.24.

83. "Since advertising is the *sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and foregone entirely." *Id.*

84. *See id.*

85. "I think it important to note also that the advertisement of professional services carries with it quite different risks from the advertisement of standard products." *Id.* at 774 (Burger, C.J., concurring). Justice Stewart wrote to affirm the validity of state and federal regulation of false or deceptive advertising. *See id.* at 775-81 (Stewart, J., concurring).

C. Interests to be Examined in Regulating Unsolicited Commercial Telephone Calls

The Court, in *Virginia Pharmacy*, refused to allow the Commonwealth to regulate its pharmacists by keeping consumers ignorant of what was considered to be vital economic information.[86] The value of the speech was its purely commercial content since the speech allowed economic choices to be made on the basis of more complete information. The free flow of commercial information was found to be "indispensable to the proper allocation of resources in a free enterprise system" and indispensable to the formation of opinions of how that system should be regulated.[87]

These interests are not inhibited by regulation of unsolicited commercial telephone calls. Such regulation does not take the form of a complete ban on the dissemination of information, but merely restricts one means of that dissemination. The Court has carefully limited its extension of first amendment protection to price advertising[88] and as a result much of the content of the restricted telephone calls may fall outside the area protected under *Virginia Pharmacy*. Certainly a consumer's right to know the information contained in these telephone calls in order to make informed choices in the marketplace should be protected, but some regulation must be permitted in order to prevent intrusion upon those who do not wish to receive the information.

Essentially, the problem is not one of *lack* of necessary information as in *Virginia Pharmacy*, but may, in fact, be one of the telephone subscriber receiving *more* information than he or she sought or expected. The subscriber, therefore, may seek some regulation of the quantity and frequency with which the information is received.

TIME, PLACE, AND MANNER RESTRICTIONS

Recognition of speech as within a protectible class does not preclude all state regulatory activities. Protected commercial speech, like all classes of protected speech, is subject to reasonable time, place, and manner restrictions.[89] Traditionally, such restrictions must allow ample alternative means of disseminating the speaker's message,[90] be content neutral,[91] and serve a significant governmental interest.[92] These

86. *See id.* at 763-65.
87. *See id.* at 765.
88. *Compare* Friedman v. Rogers, 99 S. Ct. 887 (1979) *and* Bates v. State Bar of Arizona, 433 U.S. 350 (1977) *with* Ohralik v. Ohio St. Bar Ass'n, 436 U.S. 447 (1978).
89. *See* 425 U.S. at 771.
90. See text accompanying notes 114-124 *infra*.
91. See text accompanying notes 125-174 *infra*.
92. See text accompanying notes 175-220 *infra*.

requirements are the elements of the equation that, when all are present, will produce a constitutionally sound regulation. Thus, if a statute is framed so as to comply with all of these requirements, it will withstand first amendment scrutiny.

In responding to a demand for regulation of protected speech, the legislature must carefully consider the requirement that the regulation be no more than a time, place, or manner restriction.[93] This requirement was articulated as early as 1938 in *Lovell v. City of Griffin*,[94] in which the Court suggested that an ordinance restricting the distribution of literature with respect to time and place might be valid under certain circumstances,[95] even though the particular ordinance under attack could not survive challenge.[96]

Time, place, and manner restrictions are permitted for various reasons, the most common being the need for "traffic control."[97] Recognizing that two groups cannot occupy the same space at the same time, the Court permits reasonable regulation of access to physical facilities.[98] Other regulations are permitted to control litter, prevent disturbances of the peace, and prevent potential nuisances.[99] Time and place are easily defined terms and cause few problems since those regulations are readily identified.[100] On the other hand, restrictions of the manner of speech present some difficulty in definition as well as recognition. One suggested definition would limit the types of manner restrictions to the

> physical and procedural incidents of public expression that are neither "time" nor "place"—for example, the size and number of posters that can be displayed in certain locations, the volume of sound amplification . . . identification of persons soliciting funds, methods of distributing literature, and the myriad other matters that must be regulated in order effectively to regulate the speech situation.[101]

Time, place, and manner regulations that have been upheld by the Court include an anti-noise ordinance aimed at preventing disruptions

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93. *See* 425 U.S. at 771.
94. 303 U.S. 444 (1938).
95. *See id.* at 451.
96. *See id.* The ordinance under attack prohibited all distribution without a permit issued by the city manager, a situation the Court would not validate.
97. *See* T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 102-03 (1966).
98. *Id.*; *see* Cox v. New Hampshire, 312 U.S. 569, 576 (1941).
99. *See, e.g.*, Grayned v. City of Rockford, 408 U.S. 104 (1972); Kovacs v. Cooper, 336 U.S. 77 (1949); Valentine v. Chrestensen, 316 U.S. 52 (1942).
100. *See* O'Neil, *Reflections on the Academic Senate Resolution*, 54 CALIF. L. REV. 88, 104 (1966).
101. *Id.*

while a school is in session[102] and an ordinance prohibiting the use of sound amplifiers on vehicles.[103] A restriction on the use of the telephone for advertising and sales is a manner restriction, closely analogous to a restriction on the method of distributing literature, and such a restriction must be reasonable if it is to be upheld by the Court.

A. Reasonableness

Reasonableness as applied to time, place, and manner restrictions has been recognized as a flexible requirement, based on the nature of a place and the pattern of its normal activities.[104] It is the test used to determine whether a time, place, or manner restriction will survive constitutional scrutiny. The Court will "weigh heavily" the fact that communication is involved in the activity to be regulated and require that any such regulation be narrowly framed to further a legitimate state interest.[105] Professor Charles Wright suggests that a part of the test is *appropriateness*: a regulation denying the right to someone to make speeches in the reading room of the library is seen by the Court as reasonable while prohibiting the same speeches in the park is not.[106]

A manner restriction of the use of the telephone, therefore, must be framed as narrowly as possible to eliminate any unnecessary infringement of the speech rights of those who wish to use the telephone as an advertising and sales device. A reasonable restriction might be one that allows the telephone subscriber to determine whether he or she wishes to receive unsolicited commercial telephone calls and merely provides a means whereby the state can enforce that determination once it is made. This kind of restriction would not operate as an absolute ban on telephone sales, thus avoiding one of the problems of *Virginia Pharmacy*.[107] This position is supported by the decisions in *Lamont v. Postmaster General*[108] and *Rowan v. United States Post Office Department*.[109] In *Lamont*, the Court invalidated a requirement that an individual take affirmative action in order to receive certain mail.[110] The government was not allowed to interrupt the flow of mail by requiring the addressee to return a postcard stating a desire to have certain items delivered.[111] In *Rowan*, the Court was faced with the

102. Grayned v. City of Rockford, 408 U.S. 104 (1972).
103. Kovacs v. Cooper, 336 U.S. 77 (1949). *But see* Saia v. New York, 334 U.S. 558 (1948).
104. *See* 408 U.S. at 116; Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027, 1042 (1969) [hereinafter cited as Wright].
105. 408 U.S. at 116-17.
106. *See* Wright, *supra* note 104, at 1045. *See also* 408 U.S. at 116.
107. See notes 58-65 and accompanying text *supra*.
108. 381 U.S. 301 (1965).
109. 397 U.S. 728 (1970).
110. *See* 381 U.S. at 307.
111. *See id.* at 305-07.

opposite situation, a statute giving an individual the right to request that certain items *not* be mailed to his or her home.[112] Since the decision was left to the individual and the government became involved only *after* the decision was reached, the Court upheld the statute.[113] By framing a statute regulating unsolicited commercial telephone calls so that the regulation provides a restriction similar to that upheld by the Court in *Rowan*,[114] the requirement of reasonableness when considered alone should be satisfied. Reasonableness must also be considered as it relates to the remaining elements—availability of ample alternative means, content neutrality, and existence of a significant governmental interest—since a regulation that does not satisfy them could be found unreasonable.

B. Ample Alternative Means

The Court will invalidate a regulation of commercial telephone calls if such a regulation effectively eliminates the only practical means of communicating the message contained in the calls.[115] This requirement severely curtails the ability of the government to regulate certain kinds of activity that are viewed as a unique means of distributing messages.[116] In upholding an ordinance prohibiting door-to-door solicitation of sales of goods,[117] the Court indicated that its decision was in part based on the fact that the usual methods of solicitation such as mail, radio, periodicals, and local outlets were still available to solicit sales.[118]

Linmark Associates v. Township of Willingboro[119] provided the Court with an opportunity to address directly the requirement of ample alternative means of disseminating the content of a communication. The township of Willingboro passed an ordinance that forbade the posting of "For Sale" or "Sold" signs on any homes other than model homes.[120] A unanimous Court struck down the ordinance, taking a very practical approach to the question of whether ample alternative

112. 397 U.S. at 730.
113. *See id.* at 738-39.
114. There is some evidence that telephone marketers would support such a restriction, as it does not completely prohibit the use of the telephone as an advertising tool. *See A Revolt*, *supra* note 2, at 27.
115. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976).
116. *See, e.g.*, Police Dep't of Chicago v. Mosely, 408 U.S. 92 (1972); Adderley v. Florida, 385 U.S. 39 (1966); NLRB v. Fruit & Vegetable Packers Local 760, 377 U.S. 58 (1964). *But see* Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).
117. *See* Breard v. Alexandria, 341 U.S. 622 (1951).
118. *See id.* at 631-32.
119. 431 U.S. 85 (1977).
120. *Id.* at 86.

means existed to advertise the availability of a house on the market.[121] Even though other means of disseminating the information were available, the Court recognized that as a practical matter real estate is not sold through the use of leaflets, sound trucks, or demonstrations.[122] The most realistic options, newspaper advertising and listing with agents, were viewed by the Court as more costly, less likely to reach the desired audience, and less effective in communicating the desired information than lawn signs.[123]

What constitutes ample alternative means will vary with each factual setting, with the Court looking at the specific target of the regulation and trying to determine if the state has left the speaker with unworkable options. An ordinance restricting unsolicited commercial telephone calls will clearly leave open ample alternative means for the caller to communicate his or her message.[124] The telephone is only one of many effective sales devices. Given the vast reach of radio, television, newspapers, magazines, billboards, and even the mail, restricting access by the telephone would not remove an essential means of communication from the advertiser. The problem of *Linmark*, the unique nature of real estate sales, is not present when dealing with telephone calls that advertise a variety of goods and services. Additionally, unlike placing a "For Sale" sign on a lawn, telephone sales can be a costly enterprise, and arguably, alternative means of reaching the consumer are at least as effective as telephone sales.

Once the regulation of unsolicited commercial telephone calls has been determined to be a reasonable restriction of the manner of speech, one that does not eliminate all of the readily available means of delivering the caller's messages, satisfaction of the remaining two elements of the equation, content neutrality and significant governmental interest, will result in the ability of the state to regulate such calls.

C. Content Neutrality

1. From Mosely to American Mini Theatres

Although the concept of content neutrality was first articulated by Justice Black,[125] the landmark decision embracing the concept as a re-

121. *See id.* at 95.
122. *See id.* at 93.
123. *See id.*
124. When considering the requirement of ample alternative means, an additional justification for limiting the regulation to commercial telephone calls is apparent. Political, religious, and charitable groups very often lack the funds to utilize other means of communication, and polls and broadcast ratings must often be taken much faster than door-to-door canvassing will permit.
125. *See* NLRB v. Fruit & Vegetable Packers Local 760, 377 U.S. 58, 76 (1964) (Black, J., concurring). *See generally* Note, *Constitutional Law—First Amendment—Content Neutrality*, 28 CASE W. RES. L. REV. 456, 464-65 (1978) [hereinafter cited as *Content Neutrality*].

quirement appeared after he had left the Court, in *Police Department v. Mosely*.[126] Content neutrality was viewed as a provision required by the first amendment, which allowed the government "no power to restrict expression because of its message, its ideas, its subject matter or its content."[127] For Justice Black this position was absolute,[128] but Justice Marshall's opinion in *Mosely* recognized that there was not an absolute ban on content distinctions but rather a presumption against their validity, requiring them to survive strict scrutiny.[129]

Three years after the *Mosely* decision, in *Erznoznik v. City of Jacksonville*,[130] an ordinance banning the showing of certain types of films at drive-in theatres based on their content was invalidated by the Court.[131] The Court found that the state interest in preventing the showing of these films outdoors was not sufficiently strong to satisfy the "rigorous constitutional standards" that must be used to determine if a regulation of expression is valid.[132] The city was not allowed to shield the public from the showing of nudity in films at drive-in theatres since the interest of the city in regulating traffic was insufficient justification for the content-based regulation of expression involved.[133]

The decision in *Virginia Pharmacy* accepted as fact that content neutrality was a requirement for the regulation of protected speech.[134] Exactly one month later, however, the Court decided *Young v. American Mini Theatres, Inc.*,[135] a case that involved a zoning ordinance restricting the location of adult theatres, defined as those that showed films with a specified content.[136] Unlike the finding in *Erznoznik*, a four-person plurality in *American Mini Theatres* found that even though the films were protected by the first amendment, their content could legitimately be used to place them in a separate class, thus allowing the city to regulate the location of the theatres based on the content of the films shown.[137] Society's interest in the first amendment protection for these films was viewed as being of a different and lesser magnitude than the

126. 408 U.S. 92 (1972); *see Content Neutrality*, *supra* note 125, at 466.
127. 408 U.S. at 95.
128. I believe that the First Amendment's unequivocal command that there shall be no abridgment of the rights of free speech and assembly shows that the men who drafted our Bill of Rights did all the "balancing" that was to be done in this field.
Konigsberg v. State Bar, 366 U.S. 36, 61 (1961) (Black, J., dissenting).
129. 408 U.S. at 98-99.
130. 422 U.S. 205 (1975).
131. *See id.* at 217.
132. *Id.*
133. *See id.* at 215-17.
134. *See* 425 U.S. at 771.
135. 427 U.S. 50 (1976).
136. The classification of a theatre as "adult" was determined by the content of the films shown; they were defined as those depicting certain sexual activities or areas of the human anatomy. *See id.* at 53 & n.5.
137. *See id.* at 69-70

interest in protecting political or ideological debate.[138] The four justices viewed the ordinance as merely a place restriction[139] and justified the absence of content neutrality by arguing that since content had been allowed to determine the extent of constitutional shelter extended to advertising in *Virginia Pharmacy*,[140] it could be argued that there is a concept of less-protected speech.[141] Implicit in this argument is the conclusion that if a class of speech can be considered less-protected, then a content-based regulation of such speech could be valid.[142] Justice Powell, supplying the fifth vote to uphold the ordinance, viewed it as an example of "innovative land-use regulation" with only incidental first amendment concerns.[143] Since there was no censorship of the content of the films and no limitation imposed on those who wished to view them, the city was free to decide where to locate the theatres.[144] This view also treats the ordinance as a place regulation, aimed not at speech but at conduct, since the activity was allowed to continue with only the situs of the activity regulated.[145]

Similarly, a restriction on unsolicited commercial telephone calls can be viewed as a regulation aimed at conduct, not at speech, since it would limit the manner in which commercial speech is presented, not its content. In addition, following the inference from *American Mini Theatres*,[146] the regulation of unsolicited commercial calls is merely a manner regulation that need not be content neutral since the content is less protected speech under *Virginia Pharmacy*.[147] Since the less protected status of commercial speech places unsolicited sales calls in a separate class,[148] and society's interest in the first amendment protection of these calls is less than that of political or ideological debate,[149] the state could regulate such calls based on their content. Thus, regulation of unsolicited commercial telephone calls will not necessarily fail for lack of content neutrality. Further clarification of the status of commercial speech can be gleaned from cases following *Virginia Pharmacy*.

138. *See id.* at 70.
139. *See id.* at 71.
140. *See id.* at 68.
141. *See id.* at 70; Ohralik v. Ohio St. Bar Ass'n, 436 U.S. 447, 455-56 (1978).
142. Since full protection is not granted to commercial speech, the Court may allow the content of the speech to be examined. *Price* advertising was protected in *Virginia Pharmacy*, but other commercial speech has not been protected by the Court. *See, e.g.*, Friedman v. Rogers, 99 S. Ct. 887 (1979); Ohralik v. Ohio St. Bar Ass'n, 436 U.S. 447 (1978).
143. *See* 427 U.S. at 73 (Powell, J., concurring).
144. *See id.* at 78-79.
145. *See id.* at 78-79, 84.
146. See text accompanying notes 134-142 *supra*.
147. *See* 425 U.S. at 771 n.24.
148. *See* 427 U.S. at 69-70.
149. *See id.* at 70.

2. Less Protected Commercial Speech

The next opportunity after *Virginia Pharmacy* for the Court to address the issue of the limited protection of commercial speech was presented in *Bates v. State Bar of Arizona*,[150] in which the Court found that attorneys have the right to advertise routine legal services.[151] In deciding *Bates*, the Court relied on *Virginia Pharmacy* for the proposition that commercial speech has been extended some, but not absolute, protection by the first amendment.[152] Once again, the Court gave weight to the right of the consumer to have access to the price information.[153] The separate opinions of Chief Justice Burger[154] and Justice Powell,[155] while not denying that commercial speech is protected to some extent, would not go as far as the majority opinion in allowing attorneys to advertise.[156] Only Justice Rehnquist would extend *no* protection to purely commercial speech;[157] the other eight justices envision placing commercial speech at varying positions along the scale of first amendment protection.[158]

That commercial speech will continue to be treated differently than other classes of protected speech is clear, based on the two most recent decisions of the Court addressing the issue of the extent of the protection afforded commercial speech by the first amendment. In *Ohralik v. Ohio State Bar Association*[159] a ban on direct client solicitation by attorneys was upheld,[160] the Court stating that commercial speech is protected "commensurate with its *subordinate position*" under the first amendment.[161] The commercial activity involved was deemed to be potentially harmful to the public and could be prohibited.[162] The Court also noted that in-person solicitation tended to demand an im-

150. 433 U.S. 350 (1977).
151. The defendants, Bates and O'Steen, desired to provide basic legal services for those who did not qualify for free legal services but who were not wealthy. Their clinic specialized in such services as uncontested divorces, name changes, and wills. They discovered that their clinic could not succeed without advertising. *Id.* at 354.
152. *Id.* at 380-81.
153. *See id.* at 376-77.
154. *Id.* at 386.
155. *Id.* at 389.
156. They felt that legal services were not so routine that a standard fee could be advertised without misleading the potential client. *See id.* at 386 (Burger, C.J., concurring and dissenting), 391-95 (Powell, J., concurring and dissenting).
157. *Id.* at 404 (Rehnquist, J., dissenting in part).
158. Justice Stevens took no part in the decision and all the remaining Justices except Justice Rehnquist joined in the decision in *Virginia Pharmacy*. 425 U.S. at 749. Chief Justice Burger and Justices Powell, Stewart, and Rehnquist dissented on the first amendment issues in *Bates*. 433 U.S. at 352.
159. 436 U.S. 447 (1978).
160. *Id.* at 454.
161. *Id.* at 456 (emphasis added).
162. *See id.* at 461-62.

mediate response, not allowing time for comparison or reflection.[163] A prohibition of the use of trade names by optometrists was upheld by the Court in *Friedman v. Rogers*,[164] partly on the rationale that since trade names may be used to mislead the public, the state may prohibit their use.[165] The information conveyed by a trade name was not the same as that conveyed by the price advertising that was the subject of the prohibitions of *Virginia Pharmacy* and *Bates*, and the Court had no difficulty in distinguishing the information.[166]

Both *Ohralik* and *Friedman* indicate that commercial speech is considered less protected by the Court and that different standards are used when examining regulations that affect commercial speech.[167] Both decisions also indicate that certain commercial speech may be prohibited based on its content because of its "subordinate position" under the first amendment.[168] As in *Ohralik* the direct solicitation by telephone, though not as potentially harmful as an attorney soliciting a client, still may demand an immediate response, not allowing time for comparison or reflection,[169] and there is a possibility of misleading statements and deception in telephone sales not unlike the *Friedman* situation.[170] Thus, the increasing emphasis on the rights of the listener indicate that the Court would allow regulation of telephone calls in order to protect those rights.

The decision of the Court in *Rowan v. United States Post Office Department*[171] provides additional justification for the belief that a regulation may be framed to apply only to commercial telephone calls. *Rowan* was decided prior to *Virginia Pharmacy* but has been cited in decisions subsequent to *Virginia Pharmacy*,[172] indicating that its reasoning remains valid. The only restriction on the householder's decision to reject mailings allowed by the statute upheld in *Rowan* is that the material sent to the home be an advertisement, a determination made by looking to the content of the mailing.[173] The regulation of the unsolicited commercial telephone calls will require a similar determination. Thus under *Friedman*, *Ohralik*, and *Rowan* the state may regu-

163. *See id.* at 457.
164. 99 S. Ct. 887 (1979).
165. *See id.* at 895-96.
166. *See id.* at 895.
167. *See id.* at 894 & n.9; 436 U.S. at 455-56.
168. Both decisions upheld regulations that affected some commercial speech. Arguably, the content of the speech determined whether the regulation in question applied.
169. 436 U.S. at 457.
170. 99 S. Ct. at 895-96.
171. 397 U.S. 728 (1970).
172. *See, e.g.*, FCC v. Pacifica Foundation, 438 U.S. 726, 748 (1978); Young v. American Mini Theatres, 427 U.S. 50, 86 n.5 (1976) (Stewart, J., dissenting).
173. *See* 397 U.S. at 739 & n.6; Note, *Federal Pandering Advertisements Statute: The Right of Privacy versus the First Amendment*, 32 OHIO ST. L.J. 149, 154 (1971).

late a commercial speech activity based on the content of that speech because of its less-protected status under the first amendment and because the paramount concern of the Court is the protection of the consumer rather than the speaker.

A statute framed as a reasonable manner restriction that allows the advertiser ample alternative means to advertise goods and services to those who wish to buy will not withstand challenge unless it satisfies the final requirement established by the Court: the statute must serve a significant governmental interest.[174] Those clamoring for regulation of unsolicited telephone calls have relied on a claim of the right to government protection for the right of privacy. If there is a significant governmental interest in protecting the right of privacy of the individual telephone subscriber, the final requirement will be met.

D. Right of Privacy: A Significant Governmental Interest

A regulation that restricts protected speech may meet all the requirements discussed and still fail to serve a significant governmental interest and will therefore be found invalid. This final element will complete the equation since government has been prevented by the Court from restricting speech where there is no governmental interest being served by the regulation.[175] The governmental interest to be placed in the equation to determine the validity of a regulation of unsolicited commercial telephone calls is the protection of the individual telephone subscriber's right of privacy.[176] This phrase has become a magic talisman, argued in a variety of situations. Many different interests have been lumped together under the banner of privacy,[177] prompting Justice Rehnquist to observe that the decisions in this area "defy categorical description."[178] Most of the decisions, however, may be placed into one of three broad classifications.[179] One group of decisions has found a right of privacy based on the fourth amendment guarantee of freedom from unreasonable searches and seizures,[180] and another group has found a right of privacy encompassing certain fun-

174. *See* 425 U.S. at 771.

175. *Compare* Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969) *with* United States v. O'Brien, 391 U.S. 367 (1968).

176. *See generally* Note, *Toward a Right of Privacy as a Matter of State Constitutional Law*, 5 FLA. ST. U.L. REV. 631 (1977) [hereinafter cited as *Toward Privacy*].

177. *See* Comment, *A Taxonomy of Privacy: Repose, Sanctuary, and Intimate Decision*, 64 CALIF. L. REV. 1447, 1447-48 (1976).

178. Paul v. Davis, 424 U.S. 693, 713 (1976).

179. *See generally Toward Privacy*, *supra* note 176, at 651-59.

180. [T]he Fourth Amendment cannot be translated into a general constitutional "right to privacy." That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all. Other provisions of the Constitution protect personal privacy from other forms of governmental invasion. But the protection of a person's *general* right to pri-

damental personal rights,[181] but neither has been extended to encompass areas of first amendment concern. The third classification is those decisions in which the Court has been willing to protect privacy interests in cases of intrusions into the home.[182]

1. Privacy in the Home

The decisions that have found a right of privacy in the home do not rely on a constitutional right of privacy, but rather on what Justice Brandeis called the "right to be let alone."[183] This right is based upon the state's ability to legislate against trespass.[184] Some of the earliest cases dealing with this problem are those concerning the rights of Jehovah's Witnesses to distribute their literature to individual homes. *Martin v. City of Struthers*[185] involved an ordinance prohibiting the door-to-door distribution of literature. The city tried to justify the ordinance on the basis of crime prevention, prevention of annoyance to householders, and protection of the right of privacy.[186] In overturning the ordinance, the Court emphasized that the decision to refuse to permit such distribution properly belonged to the householder,[187] who was required to assert the right of privacy by taking affirmative steps to protect the right, such as posting "No Trespassing" signs, in order to gain the protection of the state for the right.[188] In *Breard v. Alexandria*[189] the opposite result was reached by the Court, and the householder's right of privacy prevailed over the first amendment rights of a door-to-door salesperson.[190] The Court stated that the home should be a place where one may shut out "uninvited strangers expound[ing] distasteful doctrines. . . . Freedom of the home is as important as freedom of speech."[191] Although the Court emphasized the distinction between

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vacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual States.

Katz v. United States, 389 U.S. 347, 350-51 (1967). *See also* Kelley v. Johnson, 425 U.S. 238, 249-53 (1976) (Marshall, J., dissenting) (refusing to allow a constitutional privacy claim to encompass a regulation of hair length); Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (1975), *aff'd* 425 U.S. 901 (1976) (application of sodomy statute to consenting adults in private upheld).

181. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965). The Court has limited the constitutional protection to what it sees as fundamental personal rights relating to marriage, procreation, contraception, family relationships, child rearing, and education. *See Toward Privacy*, *supra* note 176, at 670.

182. The home seems to have a special significance to the Court and has become one of the most clearly delineated zones of privacy. *See* 397 U.S. at 737; 341 U.S. at 644-45.

183. *See* Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

184. *See* Martin v. Struthers, 319 U.S. 141, 147-48 & nn.10-13 (1943).

185. 319 U.S. 141 (1943).

186. *See id.* at 144.

187. *See id.* at 148.

188. *See id.*

189. 341 U.S. 622 (1951).

190. *See id.* at 644.

191. *Id.* at 639 n.27.

the religious literature of *Martin* and the magazines of *Breard*,[192] a distinction of questionable validity since *Virginia Pharmacy*,[193] the Court did recognize the right of an individual to build a wall around the home to keep out unwanted people.[194] From that position, it is a short step to recognize the right of an individual to keep out unwanted messages however they are disseminated.

2. Rowan v. United States Post Office Department

A key consideration for the Court in determining whether the state may protect the right of privacy of an individual at the risk of infringing on the first amendment rights of another has become the site of the invasion.[195] There is an increased willingness on the part of the members of the Court to allow regulation of intrusions into the home but to refuse to permit similar regulations of intrusions elsewhere.[196] *Rowan v. United States Post Office Department*[197] states that a householder has the right to determine what material enters the zone of privacy surrounding the home.[198] In *Rowan*, a group of direct mail advertisers challenged a federal statute that permitted individuals to request that a particular sender refrain from mailing advertisements to their homes because such mailings were found to be offensive by that individual.[199] Once the initial determination was made by the recipients that the material was offensive, a procedure existed whereby the government could enforce the desires of the individual requesting termination of such mailings and could punish persons continuing those mailings after proper notice.[200] Looking to the right of an individual to decide whether to allow a distributor of literature to call at his or her home, the Court refused to allow any greater protection for material con-

192. Since selling from door to door was "commercial" the Court had no difficulty with this distinction. *See* 341 U.S. at 642-43.

193. Since *Breard's* holding on the first amendment issue rests squarely on the premise that such speech was commercial, the decision in *Virginia Pharmacy* arguably overruled it. *See* 425 U.S. 758-60.

194. *See* 319 U.S. at 148.

195. *See* note 182 *supra*.

196. The Court has been receptive to the plight of the captive audience outside the home as well. *Cf.* Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (upholding prohibition of political advertising on transit system cars); Kovacs v. Cooper, 336 U.S. 77 (1949) (upholding ban on sound trucks emitting "loud and raucous" noises). *But cf.* Public Utils. Comm'n v. Pollak, 343 U.S. 451 (1952) (holding that radios in buses do not constitute an invasion of privacy, since there is no right of privacy in a bus equal to that in the home); Saia v. New York, 334 U.S. 558 (1948) (invalidating an ordinance requiring a license issued by the chief of police in order to use sound amplifiers in a public place).

197. 397 U.S. 728 (1970).

198. *Rowan* was cited as authority for the proposition that there is an area of privacy around the home in *FCC v. Pacifica Foundation*, 438 U.S. 726, 748, 759 (1978).

199. *See* 397 U.S. at 729. *See generally* 39 U.S.C. §3008 (1970) (former §4009).

200. *See* 39 U.S.C. §3008 (1970).

signed to the mail.[201] To allow greater protection would be to permit a form of trespass, a result found to be untenable since the Constitution guarantees only the right to speak, not the right to force others to listen.[202] The right of the individual to be let alone in this situation outweighs the right of the advertiser to enter the home to communicate his or her message.[203] While the disturbance caused by the receipt of mail may be substantially less than that caused by the doorbell, any unwanted intrusion was viewed as unacceptable once the choice was made not to permit it.[204]

Decisions subsequent to *Rowan* have continued to look to the site of the invasion to determine whether the first amendment claims are superior to the privacy interests. In *Cohen v. California*,[205] the Court overturned the conviction of a man wearing a jacket that had "Fuck the Draft" written on it, saying that the unwilling viewer could avert his or her eyes.[206] While there was sympathy for the plight of the viewer,[207] the existence of the option to walk away justified the refusal to allow the state to curtail such speech.[208] The same rationale prevailed in *Erznoznik v. City of Jacksonville*,[209] in which the Court found that the viewer offended by the content of certain films could turn away and refused to allow the state to prohibit the showing of the films.[210]

In the celebrated "Seven Dirty Words" case[211] the Court was again faced with the conflict between the first amendment rights of a speaker and the right of privacy of the potential listener.[212] The Federal Communications Commission was allowed to prohibit the broadcasting of material that admittedly was not obscene, in part because the broadcast entered the home,[213] where the "individual's right to be let alone plainly outweighs the First Amendment rights of an intruder."[214] Five

201. 397 U.S. at 737.
202. *Id.*
203. *See id.* at 736.
204. *See id.* at 736-37.
205. 403 U.S. 15 (1971).
206. [T]he mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense. . . . [W]e are often "captives" outside the sanctuary of the home.
Id. at 21.
207. *See id.* at 21-22.
208. The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.
Id. at 21.
209. 422 U.S. 205 (1975).
210. *Id.* at 212.
211. FCC v. Pacifica Foundation, 438 U.S. 726 (1978).
212. *See id.* at 748.
213. *Id.* at 748, 759. The Court used this reasoning even though the complaint was lodged by someone who had heard the broadcast on his car radio. *Id.* at 729-30.
214. *Id.* at 748.

justices,[215] in the two opinions that formed the plurality, felt that *Rowan* allows state regulation to restrict access to the home by broadcasters as well as mailers.[216]

These decisions clearly indicate that the Court is almost certain to find that there is a significant governmental interest in protecting an individual's right to control who or what may enter his or her home.[217] The ringing of a telephone is as great a disturbance as the ringing of a doorbell and is virtually impossible to ignore. Unlike the situation in *Cohen*, in which the unwilling viewer could avert his or her eyes, there is no means to avert one's ears from a ringing telephone.[218] The inference from *Rowan* and *Pacifica* is that even protected speech can be regulated if it invades the home.[219] Whether the speech is a nonobscene radio broadcast, the receipt of offensive material through the mails, or an unsolicited commercial telephone call, the Court would still find that the right to be let alone outweighs the first amendment considerations. Indeed, in light of the less protected status of commercial speech, the Court is certain to find that telephone calls can be regulated. A statute similar to that upheld in *Rowan*, providing for a method of refusing unsolicited telephone calls initiated by the telephone subscriber rather than the state, would provide the required degree of protection for the consumer without destroying the first amendment rights of the seller who wishes to use the telephone as an advertising tool in his or her business.[220]

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215. Chief Justice Burger and Justices Stevens, Rehnquist, Powell, and Blackmun joined in the two opinions.

216. A parallel was drawn between indecent language on the radio and an indecent telephone call.

> To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow. One may hang up on an indecent phone call, but that option does not give the caller a constitutional immunity or avoid a harm that has already taken place.

438 U.S. at 748-49.

217. The California constitution expressly provides that all people have a right to pursue and obtain privacy. CAL. CONST., art I, §1. Using this provision, there is an even stronger argument under state law that protecting privacy is a significant governmental interest.

218. *See* 403 U.S. at 21.

219. *See* 397 U.S. at 737. The Court stated that:

> [T]he power of the householder . . . is unlimited; he or she may prohibit the mailing of a dry goods catalog because he objects to the contents—or indeed the text of the language touting the merchandise.

Id.; *see* 438 U.S. at 746-47. The Court in *Pacifica* assumed that the radio monologue would be protected in "other contexts" but found that it was not "entitled to absolute protection under all circumstances." *Id.*

220. It should be noted that *Rowan* allows action after a particular advertisement has been found offensive. The telephone privacy statute must be wider in scope and encompass all advertisers whose calls fit the definition. This can be justified by looking to the difficulty of individually notifying each potential caller of the desire not to receive the calls.

CONCLUSION

This comment has focused on the first amendment requirements enumerated by the United States Supreme Court in *Virginia Pharmacy* to enable a statute regulating commercial speech to survive a constitutional challenge based on the freedom of speech of the advertiser.[221] Regulation of unsolicited commercial telephone calls must take the form of a reasonable manner restriction. In addition, although the regulation need not be content neutral, it must allow ample alternative means of communication and serve a significant governmental interest.[222] A statute regulating unsolicited commercial telephone calls that satisfied these requirements was proposed during the 1978 session of the California Legislature.[223] This indicates that there has been some response to the demand for regulation, but the bill failed passage. Hearings have been held by the California Public Utilities Commission,[224] and action by that body could alleviate some of the problems telephone subscribers face, but the most effective action would be the enactment of legislation allowing the telephone subscriber to turn off the calls at the source. Such legislation would provide that the individual who pays for the telephone service could make the decision not to receive unsolicited commercial telephone calls and thus would provide protection for the privacy of those individuals who choose to build a wall to keep out unwelcome messages, no matter how valuable.

The California Legislature has responded to a limited part of the problem by regulating automatic dialing-announcing devices.[225] While this is certainly a worthwhile first step, the problem of "junk calls" will continue to grow unless some power is placed in the hands of the telephone subscriber to refuse to accept these calls. By carefully examining the limits on permissible regulation of commercial speech, it is possible to frame a regulation that places the solution to the problem in the hands of the targets of such advertising, rather than one that allows the state to regulate or prohibit such calls. This is in keeping with the philosophy of *Virginia Pharmacy* that protection of commercial speech should benefit the consumer and not the seller. Each individual should have the power to hang a "No Trespassing" sign on the telephone without destroying the right of the advertiser to speak. At least in the home,

221. See text accompanying notes 90-93 *supra*.
222. See text accompanying notes 108-220 *supra*.
223. SB 1352, 1977-78 Regular Session, *as introduced*, Jan. 10, 1978.
224. *See* Public Utils. Comm'n Decision No. 89397 (Sept. 19, 1978) (copy on file at the *Pacific Law Journal*).
225. CAL. PUB. UTIL. CODE §§2821-2825; *see* 10 PAC. L.J., REVIEW OF SELECTED 1978 CALIFORNIA LEGISLATION 382 (1979).

the state should be willing to protect the right of the individual not to listen.

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